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In the Supreme Court of the United States

OCTOBER TERM, 1976

76-7071

No. .....

SUMTER PLYWOOD CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Sumter Plywood Corporation, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 535 F.2d 917 (5th Cir. 1976) and is reprinted in Appendix A. The unreported order and adopted decision of the National Labor Relations Board are reprinted in Appendixes D and E respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1976. A timely petition for rehearing was denied on October 6, 1976 (Appendix B). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a rule of law which allows a party in a union campaign to appeal to the "race-consciousness" of blacks *only* is reverse discrimination creating a suspect classification and thus denying equal protection?

2. Whether the above rule, when premised on an irrebuttable presumption that only blacks are economically disadvantaged, denies due process?

3. Whether the above rule is unconstitutionally vague and further denies due process of law?

4. Whether a union's racial appeal in an organizational campaign violates the national labor policy of requiring unions to fairly represent all employees?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense

> to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

1. Background Facts

The Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, petitioned the National Labor Relations Board on September 12, 1972, for an election at Sumter Plywood Corporation in Livingston, Alabama. The appropriate unit contained 204 black employees and 37 white employees. In general, the union's campaign strategy was to win solid black support to insure victory. The campaign was directed exclusively toward blacks. The union did not show mere "benign indifference" toward whites, but revealed an attitude of racial hostility.

During the course of the campaign, the record reveals that the following occurred: Black union organizers specifically avoided distributing union literature to white employees at the plant gate; white employees were not invited to join the union or attend union meetings; the union held an organizing party in an all-black cafe; portions of the union's campaign literature were aimed at racial issues; the chief union organizer stated in an organizational speech that blacks have been under slavery for 100 years, and the union could help; all of the union organizers were black except the chief organizer; the chief organizer stated that black people had been behind for a long time; a

union representative called a black employee a "white mouth" because she indicated she was opposed to the union; black power bumper stickers and clenched fist salutes appeared shortly before the election; a pro-union cheer developed shortly before the election which included the black power salute; in reference to the union's campaign literature containing the picture of a black man who had been kicked out a door and was on his knees begging, a union supporter said that "that was the way the white man had treated the black man for over 100 years"; union supporters stated that black people did not have any jobs in supervision and in the office and that if the union were voted in that would be a way to get some of the white people out of the office; union supporters talked about black power at a meeting and they said they wanted to have black secretaries and all black supervisors; a union organizer said that if the employees voted for the union they would get them what they wanted; in response to a supervisor's statement against the union, a black union supporter stated that, "If the union comes in, we will have the power in our hands," and raised a clenched fist in the black power salute.

The union won the election by a margin of 156 to 77.

2. NLRB Proceedings

After the election, the company filed timely objections to the election which were investigated by the Regional Director of the NLRB's Tenth Region. The company's sixth objection was that:

> The [union] . . . engaged in conduct calculated to exacerbate, incite and inflame racial feelings and prejudices among the black employees on matters other than election issues.

The Regional Director issued his report (reprinted in Appendix E) on these objections on February 12, 1973. The report stated that:

> The evidence considered as a whole does not reveal the kind of appeals to racial prejudice, on matters unrelated to the election issues, which make it impossible for employees to exercise the franchise in a sober and informed manner. The employer presented no evidence of overt appeals to racial prejudice that would tend to engender racial hatred. An overwhelming majority of the employees in the unit were black; the petitioner directed its campaign primarily toward these employees; and because of the general election in which white and black candidates were opposing each other, race was an issue in Sumter County in November, 1972. Certainly, many of the employees were interested in their status as black individuals. It appears from the evidence that [the union] raised the issue of race in an effort to show that it could bring economic benefits to Negro workers rather than in an effort to inflame racial hatred with irrelevant and unrelated matters. Under such circumstances the Board has found that introduction of the racial issue into a campaign does not warrant setting aside an election.

Although the company filed timely exceptions to the Regional Director's report, the Board, on May 16, 1973, adopted the decision and recommendation of the Regional Director and certified the union as the exclusive bargaining agent in an unreported decision reprinted in Appendix D.

In order to test the legal issues involved, the company refused to bargain with the union. The union then filed an unfair labor practice charge, and the Board issued a

complaint alleging that the company refused to bargain. In its answer, the company admitted that it had refused to bargain, but set up by way of an affirmative defense that the certification was void because objection number 6 (among others) should have been sustained.

On May 10, 1974, the Board issued an order granting the General Counsel's motion for summary judgment on the issue of the racial appeal. However, the Board did order a hearing on another issue unrelated to this petition. After the hearing on the other issue, the Administrative Law Judge entered her decision and found that the company had violated the Act by refusing to bargain.

The Administrative Law Judge's decision was adopted by the Board in an order dated December 3, 1974, and reported at 215 N.L.R.B. No. 56.

3. Enforcement Proceedings

After the company again refused to bargain, the Board applied with the Court of Appeals for the Fifth Circuit for an enforcement order pursuant to §10(e) of the National Labor Relations Act, 29 U.S.C. §160(e). In granting enforcement, the Court of Appeals considered several questions. The only issue below on which review is sought is whether the union's racial appeal to blacks while excluding whites was permissible.

On this issue, the court stated:

> [W]e assume as true any further allegations made by the Company which [were] supported by the proffer of specific evidence.
>
> * * *
>
> The allegations of the Company and the evidence before the Regional Director are sufficient for us to conclude that the Union's campaign evinced only a minimal interest in the white voters. The Board, at oral argument, conceded that this was a fair characterization of the campaign.

535 F.2d at 925-26. In spite of the evidence before it, the court held that:

> This concentration of voters of one race, to the relative exclusion of voters of the other, is disturbing and is not to be condoned, but we feel that it is not enough in itself to invalidate the election. . . .

Id. at 926. The court rationalized that:

> [T]he relative (but not absolute) exclusion of whites from the campaign is disturbing, but is not a sufficient ground upon which to conclude that the union is anti-white. . . . Rather, the Union's propaganda was directed at connecting the desire for economic betterment among blacks . . . with the traditional promises of unionism.

Id. at 931.

WHY THE PETITION SHOULD BE GRANTED

This petition raises the question of whether the Court of Appeals violated three separate constitutional principles embodied in the Fifth Amendment by announcing a rule of law sanctioning reverse discrimination and by creating a double standard between whites and blacks in a union election campaign. Assuming that the decision is not fraught with constitutional infirmities, there is also the subsidiary, but important, national labor policy question of whether an appeal to "race consciousness" undermines the ultimate objectives of collective bargaining and fair representation.

1. The Appeal to "Race Consciousness" and Suspect Classifications

Beginning with *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962), the Board has followed the policy of setting aside an election where either party makes a "deliberate sustained appeal to race prejudice." In *Sewell*, the company appealed to the "prejudice" of its all-white workforce in rural Georgia in 1961 by excessively publicizing an AFL-CIO donation to a civil rights organization and a picture of a white AFL-CIO official dancing with a black female. Contrasting the instant case with *Sewell*, the Fifth Circuit held here that:

> It appears from the evidence that [the Union] raised the issue of race in an effort to show that it could bring economic benefits to Negro workers rather than in an effort to inflame racial hatred with irrelevant and unrelated matters.
>
> * * *
>
> This decision . . . appl[ies] the neutral principle that some degree of "consciousness-raising" will be permitted in union organizing campaigns among ethnic groups which have historically been economically disadvantaged, as long as the ethnic message becomes neither the core of the campaign nor inflammatory. For such groups, the call to ethnic pride and unity has a strong claim to congruence with the union's traditional call to economic betterment. This cannot be said of appeals to the "ethnic pride" of historically advantaged groups.

535 F.2d at 928-29.

With these words, the court of appeals created a patent double standard, *i.e.*, when whites raise the issue of race, it is *unlawful prejudice*, but when blacks raise the issue

of race, it is *permissible "consciousness-raising."*[1] This double standard is an impermissible "classification" because it results in one rule of law for blacks and another for whites.

It is well-settled that when a court or any other branch of government creates a classification it is subject to strict scrutiny under the fifth or fourteenth amendments. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). This court has firmly established that as the fourteenth amendment requires equal protection of all branches of state government, the fifth amendment requires no less of the federal government. *See Weinburger* v. *Wiesenfeld*, 420 U.S. 636 n.2 (1975).

Since the classification here is based on race, it is subject to rigid scrutiny.

> [S]trong policy renders racial classifications constitutionally suspect . . . and subject to the most rigid scrutiny . . . and in most circumstances irrelevant to any constitutionally acceptable legislative purpose.
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> * * *
>
> [O]ur inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the classified conduct when engaged in [by one race and not

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1. The Fifth Circuit is not the original author of this double standard, but is the court which has most recently supported it. The Board originally coined the phrase "racial self-consciousness" in espousing the principle that it would not set aside an election where, although a union's campaign had racial overtones, its main thrust was "to encourage racial pride and concerted action." *Aristocrat Linen Supply Co.*, 150 N.L.R.B. 1448 (1965). See also *Archer Laundry Co.*, 150 N.L.R.B. 1427 (1965); *Baltimore Luggage Co.*, 162 N.L.R.B. 1230 (1967), *enf'd* 387 F.2d 744 (4th Cir. 1967); *Hobco Mfg. Co.*, 164 N.L.R.B. 862 (1967). Thus, this inimical double standard is becoming stubbornly embedded in our national labor policy, and, to date, has evaded constitutional scrutiny.

the other]. Without such justification the racial classification . . . is reduced to an invidious discrimination forbidden by the Equal Protection Clause.

* * *

Such classifications bear a far heavier burden of justification. "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

McLaughlin v. *Florida*, 379 U.S. 184, 192-94 (1964) (citations omitted). Therefore, this case presents the question of whether there is an overriding justification for the double standard created by the court of appeals.

Apparently anticipating a constitutional challenge, the court tried to explain that its holding did not amount to reverse discrimination.

> Our decision . . . contrasted with *Sewell* [does] not reflect a *direct* racial double standard . . . [but rather] appl[ies] the neutral principle that some degree of "consciousness-raising" will be permitted . . . among ethnic groups which have historically been economically disadvantaged.

Id. at 929 (emphasis added).

The articulated basis of the court's classification is, it is respectfully submitted, mere linguistic sophistry, which runs afoul of three separate constitutional principles. How can a principle be neutral if it only operates in favor of blacks? In disclaiming a *direct* racial double standard, the court of appeals implicitly admitted that it did create an *indirect* racial double standard. However, under equal protection "that which cannot be done by express . . . prohibition cannot be done by indirection." *Anderson* v. *Martin*, 375 U.S. 399, 404 (1964).

The court's semantic distinction of "consciousness-raising" is a mere shibboleth for reverse discrimination which provides unions with a court-sanctioned vehicle to make a racist appeal to voting units with black majorities. This Court should not look to the semantics, but to the practical effect and meaning of the holding below. "It is by such practical considerations based upon experience rather than by theoretical inconsistencies that the question of equal protection is to be answered." *REA* v. *New York*, 336 U.S. 106, 110 (1949).

Since the classification is based on race, this Court should grant the petitioner an opportunity to demonstrate the absence of any compelling and overriding governmental interest justifying the classification, and at the same time, give the Board the opportunity to argue the existence of same.

2. The Irrebuttable Presumption and Due Process

Even, assuming arguendo, this racial classification is not suspect and instead should be analyzed under the less strict test of rational basis, it still suffers from constitutional infirmities. The court of appeals said that blacks can appeal to race consciousness because they have historically been economically disadvantaged. That holding is premised on a stereotyped assumption which creates an irrebuttable presumption and constitutes an independent violation of the fifth amendment. The assumption that blacks are, and/or historically have been, economically disadvantaged (as opposed to whites) was made without affording either party the opportunity to prove or disprove its validity.

In *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), the Court considered the constitutionality of a rule which required a pregnant teacher in her fifth or sixth month to take a leave of absence. The rationale behind the rule was that a female 5 or 6 months pregnant was physically unable to teach school.

> [W]e can assume, arguendo, that at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy.
>
> * * *
>
> But the question is whether the rule sweeps too broadly. . . . That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination. . . . The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.
>
> * * *
>
> Thus, the conclusive presumption embodied in these rules . . . is neither "necessarily [nor universally true" and is violative of the due process clause.

Id. at 644, 646.

Similarly, it is neither necessarily nor universally true that all blacks are economically disadvantaged and that all whites are economically advantaged. Such a conclusive and irrebuttable presumption precludes the petitioner from showing that blacks are no more or less economically disadvantaged than whites at Sumter Plywood Corporation

and in Sumter County, Alabama. The petitioner was also precluded from affirmatively showing that it has never discriminated on the basis of race.[2]

Due process mandates an individualized determination in each case. If the petitioner could show that blacks and whites are in the same boat economically, it would destroy the presumption supporting the court of appeals' holding. The irrebuttable presumption denies the petitioner its opportunity to make such a showing—and thus denies it due process.

Apart from the constitutional shortcomings, the court also used an irrational consideration to support its holding.

> A final factor strongly supports our decision not to deny enforcement—the election result was 156 to 77 in favor of the Union. With that majority, a significantly stronger showing of improper coinsideration of race than was proffered here would be required for us to negate the Board's decision to uphold the election or to remand to the Board for a hearing on the issue.

535 F.2d at 929. The margin of victory is not a fact from which one can logically infer that the racial appeal

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2. The basic unfairness of an irrebuttable presumption is clearly illustrated in the court's explanation that the campaign appeals were not racial.

> [T]he few other random incidents with racial overtones suggest perhaps that some supporters of the union attempted to capitalize on *black resentment against previous white oppression* by associating anti-unionism with that white oppression.

535 F.2d at 927 (emphasis added).

This court should remember that petitioner was never afforded a hearing to rebut the presumptions of "white oppression" and "black economic disadvantagement." These presumptions are at best, using the Court of Appeals' own words on another issue, "assumption[s] grounded in a past all too recent, but none the less past." *Id.*

did not interfere with a reasoned choice and did not materially affect the outcome of the election. For example, in *Sewell*, the company made a racial appeal to its all-white workforce and defeated the union by 985 to 331. From the margin of victory, the Board quite logically inferred that the racist appeal *did* materially affect the outcome of the election. However, the court of appeals would have drawn the opposite inference. What is so ironic about the court's reasoning is that it allows a union to make a racial appeal especially when it wins the election.

The reasonable inference is that the racial appeal had precisely the intended—but nevertheless illegal—effect of winning solid black support by using irrelevant racial appeals. Such an appeal would almost automatically guarantee a union victory where blacks comprise the great majority of employees. Here, there were 204 black employees and 37 white employees. The union won the election 157 to 77.

It is difficult to understand why the court gave such weight to the irrational factor of the margin of victory when it admitted that the facts of the case were so troubling.[3] If an appeal to race consciousness is legitimate, why was the court of appeals so troubled by the evidence? The court obviously realized that the line between black consciousness-raising and black racism is illusory at best.

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3. The opinion is threaded with disparaging references to the evidence, e.g., "this is by no means an easy case," *id.* at 919; "[t]his concentration on the voters of one race to the relative exclusion of voters of the other, is disturbing. . . . [d]espite the heightened suspicion with which we regard these incidents, because of the relatively exclusive concentration of the campaign upon blacks," *id.* at 926; "we do not by any means condone all of the action and omissions on the part of the Union in the course of this campaign. . . . we are disturbed by some of the evidence," *id.* at 931.

3. The Vague Holding and Due Process

Even assuming that there is a distinct difference between black consciousness-raising and black racism, its application presents a third constitutional problem. This nebulous term—black "consciousness-raising"—has no definition which can be articulated with precision by reasonable men.

> [A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law.

Baggett v. *Bullitt*, 377 U.S. 360, 367 (1964). "Consciousness-raising" is just as vague as the terms "opprobrious words or abusive language," *Goodling* v. *Wilson*, 405 U.S. 518 (1972); "treating a U.S. flag contemptuously", *Smith* v. *Goguen*, 415 U.S. 566 (1974); or "seditious utterances," *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). All of these phrases are "wholly lacking in terms susceptible of objective measurement." *Id.* at 604. Although the Constitution's proscription against vagueness has generally been applied to acts of the legislative branch, there is no reason why a parallel application cannot be made to a judicial decision. *See e.g., Bouie* v. *Columbia*, 378 U.S. 347 (1964). Otherwise, the court of appeals will have compounded its error by creating a suspect classification and by then failing to give it a definitive meaning.

4. The Important Question of National Labor Policy

This petition raises the question of whether it is in the interest of national labor policy to allow a union to gear its campaign, as a matter of political expediency, to a particular race, and whether a union certified under such circumstances can fairly represent all employees.

This cases is important because it also illustrates the recent phenomenon that the government, in its good faith zeal to bring equal opportunity for minorities into fruition by the removal of artificial and arbitrary barriers thereto, can exceed permissible limits and, itself, foster reverse discrimination.

The national labor policy declared by Congress in §1 of the National Labor Relations Act, 29 U.S.C. §151, is to promote collective bargaining as a means of eliminating industrial strife and promoting labor peace. Congress recognized that employees have a common bond of economic interest in dealing with their employer on matters of wages, hours and working conditions. Congress also recognized that the concerted activity of employees to promote those common interests can be, at times, adverse to the interest of their employers. Congress therefore intended to promote the resolution of resulting conflicts through collective bargaining as a cornerstone of our national labor policy.

This Court has embellished on this policy by holding that unions have the duty to fairly represent all employees without racial hostility or discrimination toward any group. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). This policy is based on the premise that the common interest of *all* employees is not served when a union practices invidious discrimination. This Court also sought to emphasize the fiduciary nature of the duty not only to passively refrain from invidious discrimination but to affirmatively promote the common interest of all employees.

The court of appeals has undercut and in fact sabotaged this important national labor policy in holding that a union can address its appeal to one racial group to the exclusion

of another in arguing that a union is in the peculiar economic interest of the former.[4]

The inevitable damage done to national labor policy is overwhelming. In *Sewell*, the Board recognized the destructive influence that the issue of race has on any union election.[5] Whether the appeal is directly to 'racial prejudice" or indirectly to "consciousness raising," the decision below allows a party to inject the superfluous ingredient of race into a union election. By raising the "consciousness" of blacks and telling them that a union is in their peculiar economic interest, the union deliberately creates the impression that blacks have more to gain by a union victory. Black employees are implicitly urged to vote for the union because they are black and not because the union will work for the common good of all employees. The fiduciary duty of fair representation requires that unions be equally concerned about the economic interests of white employees.

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4. This Court has observed "that promising benefits or conferring benefits before representation elections may unduly influence the representational choice of employees where the offer is not across-the-board to all employees." *N.L.R.B.* v. *Savair Mfg. Co.*, 414 U.S. 270 n.6 (1973).

5. We take it as datum that prejudice based on color is a powerful emotional force. We think it also indisputable that a deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty.

What we have said indicates our belief that appeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere "prattle" or puffing. They have no place in Board electoral campaigns. They inject an element which is destructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise. The Board does not intend to tolerate as "electoral propaganda" appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election.

138 N.L.R.B. at 71.

The natural and intended consequences of such conduct is that whites and blacks feel they have separate and perhaps conflicting interests in union representation. Therein lies the danger to our national labor policy, especially as articulated in *Steele* and its progeny. Any racial appeal superimposes the artificial conflict of race between employees over the labor management relationship which is often an adversary one. Further, a racial appeal breeds distrust and strife among employees represented by the same union. Sound labor policy is served not only when a union fairly represents all employees, but also when employees believe their union fairly represents them. Trust is based as much on faith as it is performance.

The decision of the court of appeals is based on a philosophy which allows a party to drive a wedge of racial animosity between employees. Such a myopic policy can only destroy—not strengthen—national labor policy.

Any policy which is premised on the assumption that the interest of employees in collective bargaining is not common, but can be broken down along racial lines, contravenes the congressional purpose of protecting "*concerted* activity for *mutual* aid and protection." The decision below is the epitome of such a policy and, therefore, is inherently destructive of the underpinnings of the national labor policy declared by Congress and strengthened by this court.

Further, this court should consider the regressive social effect of allowing such a racial appeal. Regardless of the good faith intent of the court of appeals, this Court should recognize that misplaced judicial paternalism which allows race to be a significant factor in a union campaign accentuates racial ill-will and encourages union support to follow racial lines. Such results are the antithesis of those salutary social goals which the Congress and this Court have so often endorsed in the past.

CONCLUSION

Wherefore, in view of the plethora of constitutional problems and policy considerations inherent in the double standard announced by the court of appeals, the petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

E. GRADY JOLLY
PAUL O. MILLER, III
MICHAEL FARRELL
Counsel for Petitioner

CERTIFICATE

I, E. Grady Jolly, one of the attorneys of record for the respondent, certify that I have this day mailed a true copy of this petition to the Solicitor General of the United States and to Paul J. Spielberg and Grant Morris, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570.

This the 18th day of November, 1976.

E. GRADY JOLLY

APPENDIX

APPENDIX A

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

SUMTER PLYWOOD CORPORATION, Respondent.

No. 75-1391.

United States Court of Appeals, Fifth Circuit.

July 23, 1976.

National Labor Relations Board petitioned for enforcement of an order that an employer bargain collectively with the union certified by the Board. The Court of Appeals, Goldberg, Circuit Judge, held that at least where the union won the representation election by 156 to 77, neither the union's preelection statement concerning initiation fees and fines, a union organizer's statement that employees could not work at the plant after the union won the election if they did not sign authorization cards, nor the racial orientation of the campaign, which appealed to ethnic pride and unity, warranted refusal to certify the union; and that there was insufficient evidence that the union should have been denied certification on the ground that it would favor black employees to the detriment of white employees and thus be unfit collective bargaining agent for all employees.

Enforced.

1. Labor Relations (Key) 214

Generally, burden is on party seeking to overturn National Labor Relations Board conducted representation election to establish that election was not fairly conducted.

2. Labor Relations (Key) 211

Question of whether conduct tended to interfere with employee's free choice in representation election is one primarily left to National Labor Relations Board discretion.

3. Labor Relations (Key) 211

In National Labor Relations Board conducted representation election, some degree of puffing and propagandizing must be permitted.

4. Labor Relations (Key) 555

On petition to enforce bargaining order of National Labor Relations Board, substantial evidence supported NLRB's finding that union's preelection statement that employees would not pay initiation fees was not prejudicially inaccurate, at least in context of election won by union 156 to 77, in that, even though union rules did not provide for automatic waiver of initiation fees, such practice was routinely followed.

5. Labor Relations (Key) 555

On petition to enforce bargaining order of National Labor Relations Board, substantial evidence supported NLRB's finding that union's preelection statement that "no labeled fines" would be imposed was not prejudicial misrepresentation, at least in context of election won by union 156 to 77.

6. Labor Relations (Key) 211

When it should be obvious to reasonable minds that union had no power to deliver special benefits allegedly promised in statements prior to representation election, there is no reason to believe that promise affected election.

7. Labor Relations (Key) 214

Employer was not entitled to hearing to determine whether union representative's preelection statement that employees could not work at plant after union won election if they did not sign authorization cards constituted prejudicial misrepresentation where employer offered no evidence beyond showing that statement was made on one occasion two weeks before election and union won election by margin of 156 to 77.

8. Labor Relations (Key) 214

Hearing is not required in every case to determine the validity of objections to National Labor Relations Board conducted election.

9. Labor Relations (Key) 211

Workers of one race should not be persuaded to vote for or against union on basis of invidious prejudices they might have against individuals of another race; however, some statements regarding effect that union might have on workers of particular race can be acceptable.

10. Labor Relations (Key) 214

Union's organizational efforts concentrating on black voters in black majority plant to relative exclusion of white voters was insufficient basis on which to invalidate election eventually won by union by margin of 156 to 77, in absence

of any indication either that whites were absolutely excluded or that union organizers deliberately promoted policy of excluding workers of one race from the campaign.

11. Labor Relations (Key) 211

Some degree of consciousness-raising will be permitted in union organizing campaigns among ethnic groups which have historically been economically disadvantaged, as long as ethnic message becomes neither the core of the campaign, nor inflammatory, in that for such groups, call to ethnic pride and unity has a strong claim to congruence with union's traditional call to economic betterment.

12. Constitutional Law (Key) 219.1

Enforcement mechanisms of National Labor Relations Board and courts cannot, consistent with constitutional requirements of equal protection, be made available to racially discriminatory unions. U.S.C.A.Const. Amend. 5.

13. Constitutional Law (Key) 213(3)

Equal protection requirements are implicit in Fifth Amendment's due process clause, and thus are binding on federal government as well as states. U.S.C.A.Const. Amend. 5.

14. Constitutional Law (Key) 213(4)

Governmental entities cannot, consistent with equal protection, enforce or support practice of private invidious discrimination. U.S.C.A.Const. Amend. 5.

15. Labor Relations (Key) 216

Drastic step of refusing to certify union on grounds that it is racially discriminatory should be taken only in

response of strong demonstration that union has in fact engaged in pattern of racially discriminatory practices and is likely to continue such practices.

16. Labor Relations (Key) 703

Court will deny enforcement of National Labor Relations Board order certifying union as bargaining agent on grounds that Board improperly refused hearing on whether union was racially discriminatory only when employer has proffered specific evidence sufficient to demonstrate pattern of racially discriminatory behavior by union which would support finding of definite propensity for racially unfair representation.

17. Labor Relations (Key) 214

Evidence of relative, but not absolute, exclusion of whites from representation election campaign was insufficient ground to entitle employer to hearing on issue whether union should be denied certification on grounds of racial discrimination, where union's propaganda was not designed to engender racial hatred, but was directed at connecting desire for economic betterment among blacks, as historically disadvantaged group, with traditional promises of unionism and where there was insufficient evidence of official union action to indicate that union would represent blacks to detriment of whites.

Elliott Moore, Deputy Assoc. Gen. Counsel, Grant Morris, N.L.R.B., Washington, D.C., Walter C. Phillips, Director, Region 10, N.L.R.B., Atlanta, Ga., for petitioner.

Paul O. Miller, III, James R. Lockard, Jackson, Miss., for respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Alabama Case).

Before BROWN, Chief Judge, GOLDBERG and RONEY, Circuit Judges.

GOLDBERG, Circuit Judge:

The National Labor Relations Board (the Board) petitions this Court for enforcement of its order that Sumter Plywood (the Company) bargain collectively with the Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Union). The Company, as respondent, argues that enforcement should be denied because of alleged improprieties on the part of the Union in its organizational campaign, and because of alleged procedural and substantive deficiencies in the Board's review of the Company's challenge to the Union's certification. Although this is by no means an easy case, we have concluded for the reasons that follow that the Union was properly certified by the Board, and thus that the Board's order must be enforced.

I. PROCEDURAL BACKGROUND

The Company is engaged in the manufacture and sale of plywood and lumber products in Livingston, Alabama. Pursuant to the Union's representation petition, and after an organizational campaign to be discussed below, an election was held among the workers at the Company on November 16, 1972. The unit, stipulated to be appropriate, included approximately 241 eligible voters, 204 of whom were black. The tally showed 156 votes for the Union and 77 against, with only four ballots challenged or void.

The Company filed seven objections to behavior alleged to have affected election results. The Board's Regional Director investigated these objections and in February,

1973, issued a Report recommending that the Company's objections be overruled and that the Union be certified. The Company filed four exceptions to this Report. In May, 1973, the Board issued a decision adopting the findings, conclusions and recommendations of the Regional Director, and certifying the Union. Chairman Miller dissented in part from this decision.

Thereafter, the Union requested that the Company begin negotiations. The Company refused to negotiate, and the Union filed an unfair labor practice charge with the Board, alleging that the Company refused to bargain in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5) (1970). After investigating the charge, the Regional Director issued a complaint against the Company in July, 1973. In its answer the Company admitted its refusal to bargain, but challenged the certification of the Union on the grounds 1) that the Regional Director should have sustained the Company's earlier objections to the election, or, in the alternative, that the Company was entitled to a hearing on those objections, and 2) that the Union engaged in racial discrimination (anti-white), which rendered the Union ineligible to utilize the remedial machinery of the Board.

In October, 1973, the Board's General Counsel moved for summary judgment. The Board then transferred the proceeding to itself and ordered the Company to show cause why the motion should not be granted. After reviewing the Company's response, the Board in May, 1974, denied summary judgment, but ordered that a hearing be held only on the specific issue of alleged misrepresentations by the Union concerning initiation fees, fines and dues, the subject of one of the Company's original objections.

After a hearing, an administrative law judge (ALJ) found the indicated objection to be without merit. Accord-

ingly, she concluded that the Company had violated Section 8(a)(5), and recommended that the Board issue an order requiring the Company to bargain on request and certain other relief. After reviewing the record and the ALJ's decision in light of the Company's exceptions and a supporting brief, a unanimous panel of the Board affirmed the ruling, findings, and conclusions of the ALJ, and adopted her recommended order.

The Board now seeks enforcement of that order. Since the Company has admitted its refusal to bargain, the only question before us is whether the Board's conclusion that the Union was a properly certified bargaining agent can be sustained. To answer that question, we must examine several specific allegations of Union improprieties in the election campaign, as well as the broader claim that the Union is racially discriminatory.

II. THE ELECTION

[1, 2] At the outset we note that, as a general rule, the burden is on the party seeking to overturn a Board-conducted representation election to establish that the election was not fairly conducted. *N.L.R.B.* v. *Mattison Machine Works*, 1961, 365 U.S. 123, 124, 81 S.Ct. 434, 5 L.Ed.2d 455. The question of whether challenged conduct tended to interfere with employees' free choice is one primarily left to the Board's discretion. *N.L.R.B.* v. *A. J. Tower*, 1946, 329 U.S. 324, 330, 67 S.Ct. 324, 91 L.Ed. 322; *N.L.R.B.* v. *Bancroft Mfg. Co.*, 5 Cir. 1975, 516 F.2d 436, 439, *cert. denied*, 1976, ... U.S. ....., 96 S.Ct. 1112, 47 L.Ed.2d 318; *N.L.R.B.* v. *Trinity Steel Co.*, 5 Cir. 1954, 214 F.2d 120, 123.

[3] Although the Board aspires to "laboratory conditions" in elections, *General Shoe Co.*, 1948, 77 NLRB 124, we recognize that clinical asepsis is an unattainable goal in the real world of union organizational efforts. On the

contrary, it is often the case that "exaggerations, hyperbole and appeals to emotions are the stuff of which election campaigns are made." *Schneider Mills, Inc.* v. *N.L.R.B.*, 4 Cir. 1968, 390 F.2d 375, 379 (en banc). *See also Baumritter Corp.* v. *N.L.R.B.*, 1 Cir. 1967, 386 F.2d 117, 120; *Collins & Aikman Corp.* v. *N.L.R.B.*, 4 Cir. 1967, 383 F.2d 722, 726. Some degree of puffing and propagandizing must be permitted, else the laboratory would be found infected in every case.

Because of our deference to the Board's expertise in these matters, and our recognition that laboratory conditions cannot be expected to prevail, we have explained the burden placed on the objecting party in the following terms:

> This is a heavy burden; it is not met by proof of mere misrepresentations or physical threats. Rather, specific evidence is required, showing not only that the unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.

N.L.R.B. v. *Golden Age Brewing Co.*, 5 Cir. 1969, 415 F.2d 26, 30.

It is against the background of these general principles that we examine the specific instances of improper conduct alleged by the Company.

A. *Misrepresentations About Fees and Fines.*

Throughout these long proceedings, the Company has asserted that the possibilities for a free and fair election were significantly diminished by the Union's statements regarding union fees and fines. Statements made by Sylvester Hicks, a leader of the Union's organizational

effort, at meetings and a leaflet distributed nine days before the election carried the following message to employees:

> YOU DON'T PAY ANYTHING TO JOIN, THERE ARE NO INITIATION FEES!
> THERE ARE NO ASSESSMENTS!
> THERE ARE NO LABELED FINES!

The Company argues, as it did before the Board, that the statements regarding initiation fees and fines are prejudicially inaccurate. The Union's Constitution specifically requires an initiation fee of between fifteen and twenty-five dollars per new member, and the Company asserts that the Union's failure to apprise the employees of this fact was a misrepresentation sufficient for the election to be set aside. The Company challenges the statement, made by Hicks and in the leaflet, that "there are no labeled fines," on the ground that this obscures the fact that the Union can impose "ordinary" fines for violations of by-laws.

These issues come to us in a different procedural posture than those to be discussed below. In denying the General Counsel's motion for summary judgment, the Board directed that there be a hearing on the Company's Objection No. 3, which dealt with the alleged misrepresentations about the cost to the employees of joining the Union. After that hearing, the ALJ found that the challenged statements "did not constitute a substantial misrepresentation of a material fact in issue in the campaign which would reasonably be expected to have a significant impact on the election." Accordingly, she concluded that the objection had been properly overruled in the certification proceeding.

[4] The Board affirmed the ALJ's findings and conclusions. Substantial evidence clearly supports this decision. As to the initiation fees, the Company admits that

evidence before the ALJ showed that it had been the standard practice of the Union to waive initiation fees for new members for ninety days following the organization of a new local. The waiver applies to employees whether or not they have signed authorization cards and irrespective of how they voted in the election.[1]

The Company argues that the bare statements that there were no initiation fees were nevertheless significant misrepresentations because the waiver was not automatic and was not under the sole control of the local—it had to be requested in each case by the Southern Council and then granted by the International Office. It is the Company's contention that

> If the employees were not told about each and every step which must be taken before the possibility that initiation fees could be charged was eliminated and/or were told no initiation fees could ever be charged under any circumstances, a misrepresentation was made which was sufficient to cause the election to be set aside.

The evidence on this issue led the ALJ to the following finding:

> With respect to initiation fees, the Union's statement . . . is not a complete and full explanation but, in the context of the Union's established practice and the information previously supplied employees at meetings, it is not a misrepresentation.

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1. The absence of discrimination on the basis of card-signing *vel non* renders *N.L.R.B.* v. *Savair Mfg. Co.*, 1973, 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495, inapplicable to this offer of a waiver of initiation fees. *See N.L.R.B.* v. *Bancroft Mfg. Co.*, 5 Cir. 1975, 516 F.2d 436, 444, *cert. denied*, 1976, ... U.S. ....., 96 S.Ct 1112, 47 L.Ed.2d 318.

The evidence fully supports that statement[2]—the Company's assertion that the Union materially misrepresented its policy on initiation fees is without merit.

[5] The "no labeled fines" statement, in the context of the entire campaign, also seems insignificant. At the hearing, Hicks defined the term as "a set fine for a set offense," and contrasted it with "ordinary" fines. The latter presumably would be fines levied pursuant to Section 45 of the Union Constitution, which provides as follows:

> The Council shall have the power to buy and collect fines for violations of the laws, trade and other rules of the council: such fines to become part of the revenue of the council.

The Company argues that the "no labeled fines" statements, even if technically accurate,[3] must have had the very misleading effect of making the employees believe that the Union imposed no fines at all.

The ALJ made the following findings in respect to this argument:

> Insofar as employees were concerned with what specific fines for what conduct they would generally subject themselves to by becoming members, Hicks' reply *i. e.* that there were no "labeled fines" may have been evasive but it was not a misrepresentation. Moreover, [the Company] had already addressed its campaign literature to . . . the subject of fines, before the Union's November 7, bulletin [containing the "no labeled fines" statement].

We note further that Hicks testified at the hearing that he had also told the employees at the meeting that "really I never knew anything about a fine period at all." He indicated that this was indeed the state of his knowledge—in his 17 years with the Union, he knew of no fine, "labeled" or otherwise which had been levied on a member of an industrial local. No evidence was adduced to contradict the inference which might be drawn from Hicks' testimony, *i. e.*, that prospective Union members had very little to fear in respect to possible fines.

In these circumstances we must sustain the conclusions of the ALJ, adopted by the Board, as supported by substantial evidence. To whatever extent that the statements regarding fines could be construed as misrepresentations, they could not have had a material effect on this election won overwhelmingly by the Union.

B. *Hicks' Statement About Cards.*

The Company's Objection No. 1 to the election charged that the Union "threatened employees with statements to the effect that the employee could get hurt if he did not vote for the [Union]." During the Regional Director's investigation of the objections prior to certification of the Union, the Company presented an employee witness who testified that Hicks had said, at an employee gathering, "if you did not sign the [authorization] card you could not work at the plant after the Union won the election." The

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2. Hicks testified that in his 17 years with the International he had never known any industrial local member who was required to pay an initiation fee in a "right to work" state (such as Alabama), and that the Union advocates that locals in these states not charge initiation fees. During the 90 day period of the initial waiver, the local is authorized to ask the Union to grant a continuing dispensation from the constitutional provision; such dispensation is automatically granted.

3. Actually, there was one "labeled" fine in the Union Constitution, even under Hicks' definition. A set fine was to be imposed on a member who attempted to pass himself off as a Union Business Representative. The ALJ found that the sanction for impersonating Business Representatives was not a burning issue in the campaign, and the Company does not challenge her finding.

Company also presented that employee's affidavit to the same effect.

In overruling this objection, the Regional Director simply stated, "No evidence in support of Objection 1 was presented by the Employer or adduced by the investigation." Chairman Miller, in partial dissent from the Board's order certifying the Union, thought that the above affidavit showed that the Regional Director's stated ground for overruling the objection was in error. Chairman Miller would have remanded Objection No. 1 to the Region "for further investigation, a hearing if necessary, and a Supplemental Report." The majority of the Board, however, decided to adopt all of the Regional Director's findings and recommendations. The majority commented on Objection No. 1 as follows:

> With respect to Chairman Miller's partial dissent, we would simply point out that the Board has repeatedly held that a statement, such as that in the employee affidavit he refers to, is not a threat of reprisal sufficient to set aside an election, because the Union did not have the power to carry out such a threat of job loss. *See, e. g., Rio de Oro Uranium Mines, Inc.*, 120 NLRB 91, 94.

In the subsequent unfair labor practice proceeding against the Company for refusal to bargain, the Company argued that it was entitled at least to a hearing on Objection No. 1. A unanimous panel of the Board, including Chairman Miller, rejected that argument and ordered the Company to bargain.

We do not understand the Company now to argue that the alleged statement on its face constituted a sufficient ground upon which the Board should have refused to certify

the Union. Rather, the Company asserts only that it was entitled at some point to a hearing on the issue of the effect of the statement.

The Company objects to the Board's characterization of the statement as a "threat," since that label would carry with it in this context a rather solicitous standard of review. *Cf. Rio de Oro Uranium Mines, supra.* Were the statement only a "threat," the fact that the Union obviously would not have the power to carry out the threat would decide the issue of the Board's favor.

[6] The Company contends that Hicks' statement should be treated instead as "a misrepresentation and/or the promise of a special benefit." Were it to be perceived as a "promise of benefit," we believe that, in this situation, substantially the same analysis as that attending the label "threat" would obtain.[4] When it should be obvious to reasonable minds that the Union had no power to deliver the special benefits, there is no reason to believe that the promise affected the election. *Cf. N.L.R.B.* v. *Savair Mfg. Co.*, 1973, 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495.[5]

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4. *Cf.* 29 U.S.C. § 158(c) [Section 8(c)]:

> The expressing of any views, argument, or opinion, . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Cf. also N.L.R.B. v. *Gissell Packing Co.*, 1969, 395 U.S. 575, 618, 89 S.Ct. 1918, 1942, 23 L.Ed.2d 547:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit."

5. In *Savair* the promise of benefit—that the Union would waive initiation fees for employees signing cards—was clearly within the control of the Union.

[7] If we assume that Hicks' statement was in the nature of a "misrepresentation," *e. g.*, a prediction that the employer would adopt a policy of discharging non-card-signers, or a purported statement of law, then a slightly different analysis should be applied. In *Bancroft*, we restated a four-pronged test, drawn from former Board and Fifth Circuit cases, for evaluating misrepresentations:

> (1) whether there has been a misrepresentation of a material fact; (2) whether the misrepresentation came from a party who was in a position to know the truth or who had special knowledge of the facts; (3) whether the other party had adequate opportunity to reply and to correct the misrepresentation; and (4) whether the employees had independent knowledge of the misrepresented facts, so that they could effectively evaluate the propaganda.

516 F.2d at 443. These tests should be seen as a systematic approach to be used in answering the general question implicit in the language quoted from *Golden Age, supra*: whether the misrepresentations "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." 415 F.2d at 30.

[8] The question before us, of course, is not whether these standards were met in this case, but rather, it is whether the Company presented enough evidence to entitle it to a hearing on the issue. A hearing is certainly not required in every case to determine the validity of objections to a Board-conducted election. *N.L.R.B.* v. *Smith Industries, Inc.*, 5 Cir. 1968, 403 F.2d 889, 894. Indeed, the relevant statutes themselves make no provision for a post-election evidentiary hearing in a representation proceeding.

The Board has provided by regulation, however, for such a hearing when the objections raise "substantial and material factual issues" which can be resolved only after a hearing. 29 C.F.R. § 102.–69(c), (d), (e). We discussed the showing necessary to require a hearing in *Golden Age, supra*:

> If the objection party shows, by specific evidence which prima facie would warrant setting aside the election, the existence of substantial and material factual issues which can be resolved only after an opportunity to observe and examine witnesses, an evidentiary hearing will be ordered. . . . To meet this burden, there must be "specific evidence of specific events from or about specific people" in support of allegations having a basis in law sufficient to overturn the election. . . .

415 F.2d at 32-33 (citations omitted).

Under the above standards, and assuming as true the allegation that the Hicks statement was made, we conclude that the Board in the context of this case was not required to hold a hearing. We would have little difficulty in finding that the statement was a misrepresentation of a fact that could in some circumstances be material in affecting an individual employee's actions. The Company, however, has offered no evidence beyond a showing that the statement was made on one occasion two weeks before the election. In the face of a 156-77 election victory for the Union, the fact of the statement alone is insufficient support for an allegation that the statement materially affected the

election.[6] To overturn the election on this point, the Company would need to show that great numbers of employees were aware of Hicks' statement, that great numbers of these employees lacked independent knowledge of the matter,[7] that great numbers of employees in fact signed cards after the statement, and that, despite this widespread acceptance of the false statement made two weeks before the election, the Company had a valid excuse for not responding. Each of these points was susceptible to some offer of proof by the Company during the Regional Director's investigation, yet none was forthcoming. In these circumstances, we decline to deny enforcement because of the Board's decision not to require a hearing on this question.

C. *The Racial Orientation of the Campaign.*

[9] The general standards enunciated at the outset of this section are subject to exception in at least one important situation relevant to this case. When racial considerations have been injected into a representation campaign by the party which prevails in the election, this Court in some circumstances will cast a burden on that

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6. *See United Steel Workers of America, AFL-CIO* v. *N.L.R.B.*, 5 Cir. 1974, 496 F.2d 1342 n. 11:

> If the vote margin in a representational election is very narrow, minor violations should be more closely scrutinized. In other words, when the apparent degree and multitude of the violations are small and the margin of the vote is wide, the less merit inheres in a petition for overturning the Board's decision upholding an election or denying an evidentiary hearing.
>
> Majoritarianism is not, of course, uniformly redemptive. We cannot say that because the Union won by a large margin, it has been cleansed of all its sins. Rather, the landslide tells us that unless a sin was truly grievous, it probably was not "material."

7. We are offended by the Company's implicit suggestion that we should take judicial notice of the fact that these employees were not very bright.

party to establish that the racial message was truthful and germane, "and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him." *N.L.R.B.* v. *Bancroft Mfg. Co., supra,* 516 F.2d at 440-41, quoting *Sewell Mfg. Co.,* 1962, 138 N.L.R.B. 66, 71-72. From *Bancroft* and the authorities relied upon therein, it appears that the major concern in this regard is that workers of one race not be persuaded to vote for or against a Union on the basis of invidious prejudices they might have against individuals of another race.[8] Clearly, some statements regarding the effect that a Union might have on the workers of a particular race can be acceptable.[9]

As with the objection relating to the statement about signing cards, there was never a formal hearing on this issue of racial taint. Thus even if we conclude that the facts found by the Board were not sufficient for the election to be invalidated as tainted by racial considerations, we still must face the question of whether the proffered evidence was sufficient to require a formal hearing on the issue. In the context of the racial taint issue here, the two questions are substantially the same, since the Company bases its arguments largely on the incidents found to be facts by the Regional Director. In the Board's refusal to order a formal hearing, we assume as true any further allegations made by the Company which are supported by the proffer of specific evidence.

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8. The facts in *Bancroft* and *Sewell* are summarized in text, *infra.*

9. *See generally Bancroft, supra; N.L.R.B.* v. *Baltimore Luggage Co.,* 4 Cir. 1967, 387 F.2d 744, *enforcing* 162 N.L.R.B. 1230; *Aristocrat Linen Supply Co., Inc.,* 1965, 150 N.L.R.B. 1448; *Archer Laundry Co.,* 1965, 150 N.L.R.B. 1427; *Allen-Morrison Sign Co., Inc.,* 1962, 138 N.L.R.B. 73. *Cf. Sewell, supra; N.L.R.B.* v. *Schapiro & Whitehouse, Inc.,* 4 Cir. 1966, 356 F.2d 675.

Bancroft indicates that the reversal of burden of persuasion occurs if the racial remarks "form the core or theme of the campaign," or if the statements are racially inflammatory. 516 F.2d at 442. If neither condition obtains, the injection of racial considerations should be reviewed under the familiar standards applicable to other types of alleged improprieties. *Id.* We will examine, then, the incidents cited by the Company and noted in the Regional Director's initial Report on Objections, to determine if the evidence and specific allegations could support a finding that racial considerations either formed the core or theme of the campaign, or, though not central, were nevertheless "inflammatory."

The electorate, as we have noted, was overwhelmingly black—204 out of 241 eligible voters. The charges leveled by the Company at the Union's attempt to woo this electorate can be grouped roughly into one alleged sin of omission—the exclusion of whites from the campaign—and one alleged sin of commission—the Union's affirmative "appeal to racial hatred and prejudice." Respondent's Brief at 19.

Statements of white workers reviewed by the Regional Director in his investigation indicated that some of the Union's black organizers specifically avoided giving to whites the campaign material that the organizers distributed to blacks at the plant gate. One white worker who was handed a campaign handbill testified to circumstances which made the distribution of the literature to him seem unintentional. These white workers stated that they were never invited to join the Union or to attend any Union meetings, and that they knew of no white workers who were so invited. The Union organizational meetings were, with the exception of a white Union organizer, attended

only by blacks. One Union organizer admitted that he had not contacted any whites during the campaign.

Other evidence before the Regional Director indicated that whites were not totally excluded from the campaign. One white Union organizer stated that he had contacted a number of white employees early in the campaign. White employees were included in the Union's mailing of campaign materials shortly before the election.[10]

[10] The allegations of the Company and the evidence before the Regional Director are sufficient for us to conclude that the Union's campaign evinced only a minimal interest in the white voters. The Board, at oral argument, conceded that this was a fair characterization of the campaign. This concentration on voters of one race, to the relative exclusion of voters of the other, is disturbing and is not to be condoned, but we feel that it is not enough in itself to invalidate the election, at least in the absence of any indication either that whites were absolutely excluded or that leading Union organizers deliberately promoted a policy of excluding workers of one race from the campaign. That the Union's appeal in this case was predominately to blacks does not in itself tell us either that race was the theme of the campaign, or that the Union's appeal was inflammatory. Rather, we think the racial one-sidedness of the Union's effort should be given the analytical effect in our review of intensifying the scrutiny with which we

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10. The Company argues that this mailing to whites should be discounted as a demonstration of even-handedness, since the *Excelsior* mailing list given the Union by the Company did not specify the race of the employees, and thus the Union could not feasibly contact only the blacks. *See Excelsior Underwear, Inc.*, 1966, 156 NLRB 1236. If it had been the intent of the Union to limit its campaign exclusively to blacks, however, the Union could simply have eschewed the colorblind mailing which obviously would reach whites, and concentrated instead on other more individualized forms of information dissemination.

regard the incidents of the Union's "appeal to race hatred" cited by the Company.[11]

The Union's major literary effort in the campaign was an eleven page pamphlet which contained two cartoons arguably racial in tone. One depicted "Uncle Tom" as one of the hurdles that must be crossed on the road to unionism; the other depicted a black man being kicked out of a welfare office, saying "I hope this don't happen to my brothers." The remainder of the pamphlet is classic campaign rhetoric —a colorblind extolment of the virtues of unionism.

At two of the Union's organizing meetings, a local black politician spoke to the all black audience, told them "black people should stick together," and urged them to register to vote. Sylvester Hicks, a major Union organizer, responded to a black employee's complaint about the paucity of black secretaries and supervisors in the plant by saying that blacks had been under slavery for 100 years, but that the Union could help.[12] At another meeting, Hicks said "something about black people being behind for a long time." A statement from one black employee alleged that she had been called a "white mouth" by one of the Union's representatives after she indicated that she would not support the Union.

The Company also presented evidence to the Regional Director to the effect that "black power" bumper stickers appeared on some employee cars about three weeks before the election, and that employees on occasion would exchange a clenched fist salute. The black employees in one

11. We will consider again the racial orientation of the campaign in the context of a separate issue, *infra*.

12. Sylvester Hicks is *deja vu*. He was also the major union organizer in *Bancroft*, *supra*.

department developed a pro-Union cheer a few days before the election which included this "black power" salute.[13]

Upon these allegations and this evidence the Company grounded its charge that the Union improperly injected racial considerations into the campaign. Despite the heightened suspicion with which we regard these incidents, because of the relatively exclusive concentration of the campaign upon blacks, we must conclude that racial considerations did not form the "core or theme" of the Union's campaign, and that the racial messages authored by the Union were not "inflammatory."

The bulk of the campaign literature consisted of colorblind unionist appeals.[14] The challenged cartoons are patently inoffensive. The term "Uncle Tom" certainly connotes some racial message, but it also connotes an economic one—the desire for a break with the tradition of economic dependency. As to the objection regarding the black male being booted from the welfare office, we can only note that the era of the invisibility of blacks in illus-

13. The record reveals two other incidents of union-supporting black employees in effect exhorting other individual black employees to support the Union as a matter of black pride. When one employee explained to a union supporter that she had not attended a Union meeting because she had not thought it necessary, the union supporter responded, "that is the reason black people had not gotten any further than they had—because they would not pull together." Another union supporter explained the welfare office cartoon, *supra*, by saying "that was the way the white man had treated the black man for over 100 years."

14. The November 8 booklet, for example, which contained the two challenged cartoons, also included the following: some biblical excerpts; a picture of clasped hands over the message that a union contract means security; an exhortation to resist the Company's possible resort to threats; a reminder that only the Union can protect employees against arbitrary layoffs; an explanation of the virtues of seniority; a cartoon showing a shabbily-dressed individual who says: "I had a chance to Vote Yes"; and a final appeal to "Remember. It is Your Life."

trative media has passed. The Company's assumption that a white figure would evince no racial message, whereas a black figure constitutes an appeal to racial hatred, is an assumption grounded in a past all too recent, but nonetheless past. Downtrodden workers are ubiquitous in Union organizing propaganda, and in choosing a color for the illustrations here, we cannot expect the Union to have been unmindful that the electorate was almost 85% black.

Nothing in the record indicates that the local politician's exhortation that "black people should stick together" was anything other than an appeal for the employees votes for him in the general election.[15] Hicks' statements to the all black audiences represented an attempt to equate black economic betterment with unionism, but could not be construed as an effort to set blacks against whites or to suggest that blacks were entitled to greater rights than whites.[16]

The black power salutes and bumper stickers indicate only that supporters of the Union identified betterment of the conditions of blacks with a victory of the Union in the

15. We have noted that "laboratory conditions" are an almost impossible goal for union elections. We further note, with gratitude, that no one has even suggested that the same goal should set the standard for general political elections. *Cf. Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 1976, ... U.S. ....., ... n. 3, 96 S.Ct. 1817, 48 L.Ed.2d 346, 44 USLW 4686, 4695 n. 3 (Stewart, J., concurring).

16. *Compare N.L.R.B.* v. *Baltimore Luggage Co.*, 4 Cir. 1967, 387 F.2d 744, *enforcing* 162 NLRB 1230 (approving Union campaign stressing racial pride in overwhelmingly black unit) with *N.L.R.B.* v. *Schapiro & Whitehouse, Inc.*, 4 Cir. 1966, 356 F.2d 675 (statements comparing union struggle in particular plant with recent, nearby incidents of racial violence sufficiently inflammatory to vitiate election Union won by one vote). *See also Aristocrat Linen Supply Co., Inc.*, 1965, 150 NLRB 1448; *Archer Laundry Co.*, 1965, 150 NLRB 1427 (both upholding union election victories despite union campaigns appealing to black pride); *Allen-Morrison Sign Co., Inc.*, 1962, 138 NLRB 73 (employer literature similar to that in *Sewell*, but acceptable because temperate rather than inflammatory).

election.[17] They do not indicate that the Union campaign was grounded on a black versus white emotionalism. The "white mouth" comment and the few other random incidents with racial overtones suggest perhaps that some supporters of the Union attempted to capitalize on black resentment against previous white oppression by associating anti-unionism with that white oppression. Even under searching scrutiny, however, these few alleged incidents in the context of the entire organizing campaign cannot be seen to rise from *de minimis* to "central" or "inflammatory" stature.

Our review of the evidence, then leaves us in agreement with the Regional Director, who after a thorough examination into the allegations concluded as follows:

> . . . [T]he evidence considered as a whole does not reveal the kind of appeals to racial prejudice, on matters unrelated to the election issues, which make it impossible for employees to exercise the franchise in a sober and informed manner. The Employer presented no evidence of overt appeals to racial prejudice that would tend to engender racial hatred. An overwhelming majority of the employees in the unit were black; the [Union] directed its campaign primarily toward these employees; and because of the general election in which white and black candidates were opposing each other, race was an issue in Sumter County in November, 1972. Certainly, many of the employees were interested in their status as black individuals. It appears from the

17. There is no suggestion that the Union was officially involved in the black power salutes and bumper stickers, and so we could deny enforcement because of this conduct only if it "disrupted the voting procedure or destroyed the atmosphere necessary to the exercises of a free choice in the representation election." *N.L.R.B.* v. *Golden-Age Beverage Co.*, 5 Cir. 1969, 415 F.2d 26, 32 n. 5. *See also Bush Hog, Inc.*, 5 Cir. 1969, 420 F.2d 1266, 1268-69; *Hobco Mfg. Co.*, 1967, 164 NLRB 862.

> evidence that [the Union] raised the issue of race in an effort to show that it could bring economic benefits to Negro workers rather than in an effort to inflame racial hatred with irrelevant and unrelated matters.

In one sense discussed above, this case is more difficult than *Bancroft, supra*. We do not have available here a factor which served to buttress our decision to uphold the election there:

> This campaign was waged in a bargaining unit which was 57% white and 43% black. As a matter of common sense, any attempt by the Union to set black against white would have been suicidal, for the Union could successfully organize these plants only by forging a harmonious racial amalgam. . . .
>
> . . . [Racially oriented statements by Union organizers] were . . . in the nature of asides addressed to a particular group of employees in the context of a campaign aimed at securing the adherence of all employees to the Union. . .

516 F.2d at 442, 443.

As noted, the unit at Sumter Plywood was 85% black, so "common sense" cannot guide us in the absence of other factors as to the wisdom *vel non* of a racist campaign.[18] We have looked carefully at the evidence, however, and find that no showing has been made that the campaign was racist. The real thrust of the *Bancroft* rationale, then, applies equally well to this case:

> . . . [T]here is no evidence here that the Union told blacks that they ought to dominate the Union or enjoy

18. The racially oriented campaign approved in *Baltimore Luggage, supra* note 9, was conducted in a unit of 144 employees, 134 of whom were black. 387 F.2d at 745.

> benefits unavailable to their fellow workers. There is no evidence that the Union sought to incite blacks against whites; at no time were there either acts or threats of interracial violence, and there is certainly nothing to indicate that the black employees were less favorably disposed toward the Company than were their white co-workers, either before or after the remarks in question. In this case there was no racially-oriented campaign; the vast bulk of the literature on both sides was devoted to the economic issues ordinarily found in representation contests: whether the Union or the Company would ensure the highest wages, the best pension plans, the firmest job security. . . .
>
> . . . [T]his record does not disclose that the disputed statements had an inflammatory effect on the black employees.

516 F.2d at 442-43.

Comparing the racially-oriented statements in this case with those permitted, though not condoned, in *Bancroft*, we find that the statements there were more difficult to excuse. Sylvester Hicks was also the Union organizer in *Bancroft*, and there he told black employees that "if the blacks did not stay together as a group and the Union lost the election, all the blacks would be fired." *Id.* at 440. Other statements and rumors from Union people attributed to the specific employer in *Bancroft* an anti-black animus. The racially oriented remarks in our case do not go so far, either in disregard of facts or in specific insinuations about the employer involved.

The racial messages delivered by the Union here, then, neither formed the core of the campaign, nor were inflammatory, and, in part because these messages dealt largely with subjective matters, it is difficult to characterize the

messages as "misrepresentations." A final factor strongly supports our decision not to deny enforcement—the election result was 156 to 77 in favor of the Union. With that majority, a significantly stronger showing of improper consideration of race than was proffered here would be required for us to negate the Board's decision to uphold the election or to remand to the Board for a hearing on the issue.[19]

We emphasize that our decision in *Bancroft* and our decision today, contrasted with *Sewell*, do not reflect a direct racial double standard. In *Sewell* the white employer in Mississippi sought to defeat the Union's 1961 organizing effort by repeatedly stressing to his all-white workforce that the Union was pro-integration. He even circulated a picture of a white Union organizer "dancing with a [black] lady friend." See 138 NLRB at 66-67. Clearly, such messages were not germane to any of the real issues in the Union's campaign, and could only have had the effect of inflaming racial prejudices in an already racially troubled time and place.

[11] This decision and *Bancroft* apply the neutral principle that some degree of "consciousness-raising" will be permitted in union organizing campaigns among ethnic groups which have historically been economically disadvantaged, as long as the ethnic message becomes neither the core of the campaign nor inflammatory. For such groups, the call to ethnic pride and unity has a strong claim to congruence with the Union's traditional call to economic betterment.[20] This cannot be said of appeals to the "ethnic pride" of historically advantaged groups.

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19. *See* note 6, *supra*. *Compare Baltimore Luggage*, *supra* note 9 (Union won by 96 to 46), *with Schapiro & Whitehouse*, *supra* note 9 (holding assumed that union won by one vote). The union's majority in *Bancroft* was 56%.

20. *See Baltimore Luggage*, *supra* note 9.

III. A DISCRIMINATORY UNION?

The Company has raised one other issue which merits attention here. In its answer and brief before the Board in this unfair labor practice proceeding, and in its brief in this case, the Company has argued that the Union was not properly certified because the Union has demonstrated that it will favor black employees to the detriment of white employees, and thus that it is unfit as a collective bargaining agent for all the employees. The Company asserts that, at the least, it should have been granted a hearing on this issue. We will review the evidence proffered by the Company, then, to determine if it supports a *prima facie* case sufficient to warrant a hearing, in the context of this refusal to bargain proceeding, on the question of whether the Union was racially discriminatory. If the evidence does not reach that level, the Board's denial of a hearing was not in error.

The case of *N.L.R.B.* v. *Mansion House Center Mgt. Corp.*, 8 Cir. 1973, 473 F.2d 471, holds that an employer's objection that a union is racially discriminatory can present a valid defense to a refusal to bargain charge, and that the remedial machinery of the Board is constitutionally unavailable to a union guilty of invidious discrimination. The Board itself has announced in *Bekins Moving & Storage Co.*, 1974, 211 NLRB No. 7, that it will consider, in election procedures, an employer's contentions that a union should be denied certification as a bargaining representative because of asserted discriminatory practices.[21]

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21. We dealt with this type of challenge by an employer in *Bancroft*, *supra*, in a context ironic in retrospect. The employer there charged that the same union involved in the case before us discriminated against *blacks*, and so, under the *Mansion House* rationale, was undeserving of certification. In support of that allegation, the *Bancroft* employer had cited only a Seventh Circuit Case adjudging two Illinois construction locals of the same union guilty of racially discriminatory practices, and a magazine article accusing some other construction locals of similar offenses.

(Continued on following page)

[12-14] The analytical basis for *Mansion House* and *Bekins* is the notion that the enforcement mechanisms of the Board and the courts could not, consistent with constitutional requirements of equal protection, be made available to racially discriminatory unions.[22] As this Court stated in *Local No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO* v. *N.L.R.B.*, 5 Cir. 1966, 368 F.2d 12, 17:

> Indeed, the Supreme Court has indicated that any statute purporting to bestow upon a union the exclusive right to represent all employees would be unconstitutional if it failed to impose upon the union this reciprocal duty of fair representation.

See Steele v. *Louisville & N.R.R.*, 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173; *Wallace Corp.* v. *N.L.R.B.*, 1944, 323 U.S. 248, 65 S.Ct. 238, 89 L.Ed. 216. *See also Humphrey*

Footnote continued—

We noted that *Mansion House* and *Bekins* dealt with discriminatory practices by specific locals, and that "[n]either case stands for the propositions that discriminatory membership practices in a single local necessarily infects an entire international or that discriminatory practice by an international must taint each of its locals." 516 F.2d at 446. We held that since the employer had failed to come forward with evidence or allegations that the particular local had engaged in such practices, the Company had "failed to raise a *prima facie* defense under *Mansion House* and *Bekins*," *Id.* at 447.

In the instant case, by contrast, the Company has alleged that this specific local has demonstrated an anti-white bias. We do not consider in this case whether and how equal protection analysis might differ when whites rather than blacks are alleged to be the victims of discrimination.

22. Equal protection requirements are implicit in the Fifth Amendment's due process clause, and thus are binding on the federal government as well as the states. *See Bolling* v. *Sharpe*, 1954, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884.

Governmental entities cannot, consistent with equal protection, enforce or support the practice of private invidious discrimination, *Shelley* v. *Kraemer*, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161.

v. *Moore*, 1965, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370; *Syres* v. *Oil Workers Int'l. Union*, 1955, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785, *rev'g mem.*, 5 Cir. 1955, 223 F.2d 739.[23]

The same considerations giving rise to the union's duty of fair representation support the *Bekins* and *Mansion House* procedures whereby the Board is to consider, at the prompting of an employer's objection, whether a union has shown such a "propensity to fail fairly to represent employees," because of racial discrimination, that the union should not be certified. We agree that this can be a proper issue for the Board to consider in certification proceedings or as an affirmative defense in a refusal to bargain proceeding against an employer.

We further note, however, that the standard for a *prima facie* showing of racial discrimination in these contexts should be a demanding one. As the Board stated in *Bekins*:

> It will thus be our task, on a case-by-case basis, to determine whether the nature and quantum of the proof offered sufficiently shows a propensity for unfair representation as to require us, in order that our own action may conform to our constitutional duties, to take the drastic step of declining to certify a labor organization which has demonstrated in an election

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23. Judge Rives, in his dissent from the original panel decision in *Syres*, observed:

> [I]t seems to me to follow as a necessary consequence, if the law provides automatic sanctions for the observance of the contract, then there can be no discrimination based on race or color. All men are entitled to the equal protection of the law and, except as punishment for wrongdoing, the law will not lend its aid to keep any man down, or to prevent his advancement or promotion. *Id.* at 745.

223 F.2d at 745. For the decision on remand from the Supreme Court, see 257 F.2d 479, 5 Cir. 1958.

that it is the choice of the majority of employees. It is not our intention to take such a step lightly or incautiously, nor to regard every possible alleged violation of Title VII, for example as grounds for refusing to issue a certificate. There will doubtless be cases in which we will conclude that correction of such statutory violations is best left to the expertise of other agencies or to remedial orders less draconian than the total with holding of representative status. To reconcile these views with a full awareness of our own constitutional responsibilities will, we recognize, not always be an easy task, but the difficulties involved do not entitle us to shrug off our oath to uphold and defend the Constitution of the United States.

211 NLRB at [1974 CCM NLRB at 34, 451-52] (emphasis in original).

[15, 16] Implicit in that statement is a factor that cannot but weigh in our analysis—the Company's argument would have more conclusive tenability if asserted by white members or non-members in a different procedural context. Because individual employees who believe that they have been victims of racial discrimination practiced by a union have remedies under Title VII, *see* 42 U.S.C. § 2000e-2(c), or through unfair labor practice complaints, *see Local No. 12, supra*, the "drastic step" of refusing to certify a union should be taken only in response to a strong demonstration the union has in fact engaged in a pattern of racially discriminatory practices, and is likely to continue such practices. For the issue before us, this standard must be modified by the general standards discussed above regarding requirements for a *prima facie* showing sufficient to warrant a hearing. Accordingly, this Court will deny enforcement of a Board order on the grounds that the Board improperly refused a hearing on whether

the union was racially discriminatory only when the employer has proffered specific evidence sufficient to demonstrate a pattern of racially discriminatory behavior by the Union which would support a finding of a definite propensity for racially unfair representation.

[17] The evidence cited by the Company on this issue was substantially identical to the evidence discussed above in relation orientation of the campaign. The Company also notes one post-election incident in which an all black bargaining committee of the Union is alleged to have complained to the Company about the demotion of a black employee whose former job was given to a white.

As discussed above, the relative (but not absolute) exclusion of whites from the campaign is disturbing, but is not a sufficient ground upon which to conclude that the Union is anti-white. We determined that the Union's campaign rhetoric cited by the Company as engendering "racial hatred" could not be so characterized. Rather, the Union's propaganda was directed at connecting the desire for economic betterment among blacks, as an historically disadvantaged group, with the traditional promises of unionism. The Union campaign did not attempt to set blacks against whites, and there was insufficient evidence of official Union action to indicate the Union would represent blacks to the detriment of whites. The one grievance confrontation alluded to clearly would be insufficient to establish the sort of pattern of discrimination necessary before the drastic step of refusing to certify a Union victorious by 156 votes to 77 would be appropriate.

We conclude, therefore, that the Board did not err in refusing to hold a hearing on the issue of the Union's alleged racial discrimination.

As we have noted above, we do not by any means condone all of the actions and omissions on the part of the Union in the course of this campaign. Mindful of the 156-77 margin and the elusiveness of the "laboratory conditions" ideal, however, we have determined that the Board's refusal to overturn the election was supported by substantial evidence. As to the more general claim of racial discrimination on the part of the Union, we are disturbed by some of the evidence, but viewing all of it, cannot find error in the Board's action. The availability of alternative remedies to individual employees victimized by discrimination reinforces our decision.

The issues in this case have been presented to us in black and white, but no such easy contrasts have been available to help us in the intellectually perilous duty of drawing lines. The tautness of the issues here makes us more respectful of the daily unraveler of these problems—the N.L.R.B. These laborious wars never cease. Our function of appellate review gives us opportunities to view the election cauldrons with reflection and perspective, but we still must admit that specificity of the rules of war is missing and violations of the rules may be difficult to evaluate. In the end, we must rest our faith in the ability of workers, apprised of the positions of both sides on all the issues, to see through puffery and hyperbole and to vote their own best interests. The Board's order that the Company bargain on request with the Union, which won this election almost four years ago, is hereby ENFORCED.

ENFORCED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1391

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SUMTER PLYWOOD CORPORATION,
Respondent.

JUDGMENT

(Filed August 16, 1976)

Before: Brown, Chief Judge, Goldberg and Roney, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Sumter Plywood Corporation, Livingston, Alabama, its officers, agents, successors and assigns on December 3, 1974. The Court heard argument of respective counsel on December 2, 1975 and has considered the briefs and transcript of record filed in this cause. On July 23, 1976, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Sumter Plywood Corporation, Livingston, Alabama, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: Aug. 16, 1976.

Issued as Mandate:

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth — Tel 504—589-6514
600 Camp Street
Clerk — New Orleans, La. 70130

October 6, 1976

TO ALL COUNSEL OF RECORD

NO. 75-1391—National Labor Relations Board v. Sumter Plywood Corporation

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk
By /s/ Susan M. Gravois
Deputy Clerk

/smg
cc: Messrs. Elliott Moore
Grant Morris
Mr. Walter C. Phillips
Messrs. Paul Miller, III
James R. Lockard

APPENDIX D

Livingston, Alabama

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 10-RC-9346

SUMTER PLYWOOD CORPORATION
Employer

and

UBC, SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, AFL-CIO-CLC
Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted on November 16, 1972, under the direction and supervision of the Regional Director for Region 10 among the employees in the stipulated unit. At the conclusion of the election, the parties were furnished a tally of ballots which showed that, of approximately 241 eligible voters, 156 cast valid ballots for, and 77 cast valid ballots against the Petitioner, with 3 challenged ballots and one cast a void ballot. The challenged ballots are insufficient in number to determine the results of the election. The Employer on November 24, 1972, filed timely objections to the election and a copy thereof was duly served on the Petitioner.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor

Relations Board has delegated its authority in this proceeding to a three-member panel.

In accordance with the Rules and Regulations of the National Labor Relations Board, the Regional Director conducted an investigation and issued and duly served on the parties his Report on Objections with recommendations in which he recommended that the Employer's objections be overruled and the Petitioner be certified as the collective-bargaining representative of the employees involved. Thereafter, the Employer filed timely exceptions to the Regional Director's report.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that all full-time and regular part-time production and maintenance employees including yard employees, quality control employees, maintenance, yard and green and landmen, the head electrician, foresters and foresters helpers, loader and dozer operators, truckdrivers, procurement and stockroom clerks, employed by the Employer at its Livingston, Alabama facilities, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, as amended, constitute a unit appropriate for

the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The Board has considered the Regional Director's report and recommendations, and the Employer's exceptions thereto, and hereby adopts the Regional Director's findings and recommendations.[1]

As we have adopted the Regional Director's recommendations that the Petitioner's objections be overruled and as the Petitioner has received a majority of the valid ballots cast, we shall, accordingly, certify the Petitioner as the representative of the employees in the unit found appropriate.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for UBC, Southern Council of Industrial Workers, AFL-CIO-CLC and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all employees in the unit found appropriate herein for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Dated, Washington, D. C., May 16, 1973.

John H. Fanning, Member
Howard Jenkins, Jr., Member
(Seal) National Labor Relations Board

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1. We find nothing in the Employer's exceptions that would warrant either setting aside the Regional Director's finding or ordering a hearing on the objections.

With respect to Chairman Miller's partial dissent, we would simply point out that the Board has repeatedly held that a statement, such as that in the employee affidavit he refers to, is not a threat of reprisal sufficient to set aside an election, because the Union did not have the power to carry out such a threat of job loss. See, e.g., *Rio de Oro Uranium Mines, Inc.*, 120 NLRB 91, 94.

Chairman Miller, dissenting in part:

I dissent only with respect to Objection No. 1, which alleged that Petitioner threatened employees with statements to the effect that the employee could get hurt if he did not vote for the Petitioner. The Regional Director overruled that objection on the ground that "No evidence in support of Objection 1 was presented by the Employer or adduced in the investigation."

The Employer excepts, pointing out that he supplied the Regional Director with an affidavit by an employee stating that a Union agent, at a meeting of employees said that "if you did not sign the card you could not work at the plant after the union won the election."

In my view, that affidavit was evidence in support of Objection No. 1, and the Regional Director's stated ground for overruling the objection is thus in error. I would remand this objection to the Region for further investigation, a hearing if necessary, and a Supplemental Report.

Dated, Washington, D. C., May 16, 1973.

Edward B. Miller, Chairman
National Labor Relations Board

APPENDIX E

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 10

CASE NO. 10-RC-9346

SUMTER PLYWOOD CORPORATION
Employer

and

UBC, SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, AFL-CIO-CLC
Petitioner

REPORT ON OBJECTIONS

The petition in the above-styled proceeding was filed on September 12, 1972. Pursuant to a Stipulation for Certification Upon Consent Election approved on October 11, 1972, an election by secret ballot was conducted on November 16, 1972, among employees in the stipulated appropriate unit to determine the question concerning representation.[1] Upon conclusion of the balloting, the parties were furnished a tally of ballots which shows that of approximately 241 eligible voters, 156 cast valid votes for, and 77 cast valid votes against the Petitioner, 3 cast challenged ballots, and one cast a void ballot. The chal-

1. The stipulated appropriate unit is: "All full time and regular part time production and maintenance employees including yard employees, quality control employees; maintenance, yard and green end leadmen, the head electrician, foresters and forester helpers, loader and dozer operators, truck drivers, procurement and stock room clerks, employed by the Employer at its Livingston, Alabama facilities, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act."

lenged ballots are insufficient in number to affect the results of the election. On November 24, 1972, the Employer filed timely objections to the election and a copy thereof was duly served on the Petitioner.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the issues raised by the objections has been conducted, and the undersigned, having considered the results thereof, makes the following findings:

OBJECTION 1:

> The Petitioner, through its officers, agents, and representatives, threatened employees with statements to the effect that the employee could get hurt if he did not vote for the Petitioner.

No evidence in support of Objection 1 was presented by the Employer or adduced by the investigation. Therefore, Objection 1 is without merit.

OBJECTION 2:

> The Petitioner, through its officers, agents, and representatives, at a time which precluded an effective reply by the employer, made substantial misrepresentations about its ability to gain improvements in wages, hours and working conditions, leading the employees to believe improvements would be automatic upon voting for the Petitioner, and not the subject of collective bargaining negotiations.

No evidence in support of Objection 2 was presented by the Employer or adduced by the investigation. Therefore, Objection 2 is without merit.

OBJECTION 3:

> The Petitioner, through is officers, agents, and representatives, at a time which precluded an effective reply by the employer, made substantial misrepresentations concerning the cost of membership in the union by telling employees that they did not have to pay anything to join the union although the union Constitution specifically provides otherwise.

The investigation disclosed that the Petitioner distributed to voting group employees, several days before the election, a handbill which asserted, "YOU DON'T PAY ANYTHING TO JOIN, THERE ARE NO INITIATION FEES! THERE ARE NO ASSESSMENTS! THERE ARE NO LABELED FINES!"[2] A copy of this handbill is attached hereto as Appendix A.

The Employer takes the position that the above-quoted statement constitutes a material misrepresentation of fact, since the Petitioner's Constitution and Laws specifically provide for the imposition of initiation fees upon new members.[3] On the other hand, the Petitioner presented evidence that this provision would not necessarily be applicable in every case, inasmuch as the Petitioner's General President has the authority to grant dispensation of obliga-

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2. One of Petitioner's International Representatives explained that "labeled fines" are predetermined fines for certain offenses.

3. The Constitution and Laws of the United Brotherhood of Carpenters and Joiners of America, as amended January 1, 1971, Section 44B, dealing with the admission of members provides in relevant part, "The application of the candidate must be presented to the Financial Secretary, with the full initiation fee, which, except for apprentices and applicants for non-beneficial membership in beneficial Local Unions, shall be not less than Fifteen Dollars ($15.00) and a sum equal to the current month's dues . . . ."

tions where such would be beneficial to the organization.[4] According to the Petitioner, dispensation of initiation fees is automatically granted for the first 90 days after the contract is signed.[5] After that time, a local union can request extension of the dispensation and such requests have apparently been routinely granted.

The Employer presented one witness who stated that, on November 12, 1972, he "stood by the window and listened" outside the building where a union meeting was in progress. The witness allegedly heard Petitioner's Organizing Representative Sylvester Hicks tell the assembled group of employees inside that their union dues would not be $6 per month but would instead be $1 to $2 per month. As pointed out by the Employer, the Petitioner's Constitution and Laws establishes minimum dues at $4 per month for all local unions.[6]

In the opinion of the undersigned, the foregoing allegations are insufficient to warrant setting aside an election. Dues, fines and assessments are matters solely within Petitioner's control and Petitioner may or may not grant dispensation of these obligations. It is not objectionable conduct for a union to offer, during the critical period, to waive its initiation fees.[7] Accordingly, Objection 3 is without merit.

OBJECTION 4:

> The Petitioner, through its officers, agents, and representatives, immediately before the opening of the polls,

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4. Constitution and Laws, Section 10N.

5. In most cases employees do not actually become members of a local until a contract has been signed.

6. Constitution and Laws, Section 45A.

7. *DIT-MCO, Incorporated*, 163 NLRB 1019.

> made substantial inflammatory misrepresentations concerning the treatment of employees by supervisory employees of the employer.

The investigation indicated that, during the afternoon of the election and thereafter, a rumor spread among many of the female second shift employees to the effect that Foreman Cameron Barber had threatened an employee with a gun in the plant parking lot. According to one witness, who stated that she personally never believed the rumor, several other employees had taken it so seriously that a fight almost developed in the plant cafeteria about whether the rumor was true or not. Barber denied that he had made the alleged threat.

No evidence was presented or adduced that this rumor was originated by or spread by the Petitioner or its agents. The existence of rumors and idle talk of this type by rank-and-file employees without official status in the Petitioner's organization does not warrant setting aside an election. Accordingly, Objection 4 is without merit.

OBJECTION 5:

> The Petitioner, through its officers, agents, and representatives, offered and gave financial inducements to employees in order to influence their vote and to induce said employees to support and persuade their fellow employees to support the Petitioner in its organizational efforts.

Most of the evidence which would tend to support this objection has been considered under Objection 3. Even though a waiver of these matters may be an inducement, it is not grounds for setting aside an election.[8]

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8. Id.

The Employer also presented evidence to show that the Petitioner held parties for the employees at which refreshments were served. Such conduct, alone, does not warrant a finding of interference. Therefore, Objection 5 is without merit.

OBJECTION 6:

> The Petitioner, through its officers, agents, and representatives, engaged in conduct calculated to exacerbate, incite and inflame racial feelings and prejudices among the black employees on matters other than election issues.

The Employer contends that a handbill distributed by the Petitioner, the appearance of a local black politician at union meetings, the appearance of "black power" bumper stickers, the use of the "black power salute" by employees, and the fact that the Union's campaign was directed primarily toward black employees, demonstrate that the Petitioner attempted to incite and inflame racial prejudices on matters unrelated to the election issues.

A copy of the booklet concededly distributed by the Petitioner or employees in front of the Employer's plant on November 8, 1972, is attached hereto as Appendix B. As pointed out by the Employer, one of the cartoons in the brochure depicts some sharpened stakes labeled "Uncle Toms," "Petting," "Sweet," etc., terms purportedly conveying racial overtones. The Employer also points out that other cartoons in the brochure depict a black employee begging for his job on his knees and being kicked out a door. The subject handout also contained a card inviting employees to a party at a local restaurant in Bellamy, Alabama, which is a nearby all-black community. Apparently no white employees attended the Union's meetings at this location.

The Employer presented several witnesses, white employees, who stated that they were never approached, but were rather avoided, by the Petitioner and its organizers as they passed out campaign materials to black employees at the plant gate. One other white employee presented by the Employer, however, did admit that he had been offered a handbill by a representative of the Petitioner outside the plant. Furthermore, the investigation disclosed that the white employees were included in a mailing of campaign materials from the Petitioner shortly before the election. One of the Petitioner's black representatives admitted that he had not contacted any white employees during the campaign. However, another representative of the Petitioner, who is white, stated that he had attended several meetings and had contacted a number of white employees early in the campaign. All of the Petitioner's organizers who were actively involved in the later stages of the campaign were black.

The investigation disclosed that Lucius Black, a local Negro political figure and (at that time) candidate for county Tax Assessor, spoke to an all-black audience at two of the Petitioner's union meetings. None of those witnesses present recalled Black asking the group to support the Union. Several allegedly in attendance stated that Black urged that "black people should stick together," and asked them to register to vote.

Employer's Personnel Manager Sam Massingill alleged that, about three weeks before the election, he began to observe for the first time a number of "black power" bumper stickers on employee automobiles in the parking lot. At the time, according to Massingill, he assumes that these stickers were related to the general election political campaign then in progress. Also, several weeks before the election, Massingill and others on several occasions

allegedly observed black employees greeting each other by raising a clinched fist in which has been called the "black power salute."

The Employer presented several employee witnesses who alleged that they had heard certain black employees, prior to the election, state that the Employer should be required to employ more black supervisors and black secretaries, and that the Petitioner had promised to help the black employees advance in the company. Finally, the Employer presented a statement from an employee who alleged that, prior to the election, she had been called a "whitemouth" by one of the Petitioner's representatives after she indicated that she would not support the Union. The employee, herself, was not presented for interview.

The Petitioner correctly points out that 204 of the 241 voting group employees were black and that it was therefore only natural to depict black persons in cartoons and use terminology readily understood by blacks in its campaign materials. The Petitioner contends that it went no further than to appeal to the legitimate interests of the voting group employees, which, in this case, were predominantly black.

In the opinion of the undersigned, the evidence considered as a whole does not reveal the kind of appeals to racial prejudice, on matters unrelated to the election issues, which make it impossible for employees to exercise the franchise in a sober and informed manner. The Employer presented no evidence of overt appeals to racial prejudice that would tend to engender racial hatred. An overwhelming majority of the employees in the unit were black; the Petitioner directed its campaign primarily toward these employees; and because of the general election in which white and black candidates were opposing each other, race was an issue in Sumter County in November, 1972. Certainly, many of the employees were interested in their status as black individuals. It appears from the evidence that Petitioner raised the issue of race in an effort to show that it could bring economic benefits to Negro workers rather than in an effort to inflame racial hatred with irrelevant and unrelated matters. Under such circumstances the Board has found that introduction of the racial issue into a campaign does not warrant setting aside an election.[9]

Since the evidence presented does not warrant a finding that the election was conducted in an atmosphere of irrelevant appeals to racial prejudice calculated to inflame the employees so that they would vote for the Union on racial grounds alone, Objection 6 is without merit.

OBJECTION 7:

> The Petitioner, through its officers, agents, and representatives, created the impression that the union was supported and favored by the federal government, more particularly the National Labor Relations Board, thereby interfering with the employees' free choice of selecting or not selecting a bargaining representative.

The Employer did not present any evidence to support this allegation. Therefore, Objection 7 is without merit.

RECOMMENDATIONS

For the reasons stated above, the undersigned finds that the Objections do not raise any material or substantial issues affecting the results of the election and therefore recommends to the Board that they be overruled in their entirety. As the tally of ballots shows that the

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9. *Aristocrat Linen Supply Co.*, 150 NLRB 1448; cf. *Sewell Manufacturing Co.*, 138 NLRB 66.

Petitioner received a majority of the valid votes cast in the election, the undersigned further recommends that a Certification of Representative issue.

Dated at Atlanta, Georgia, this 12th day of February, 1973.

/s/ Walter Phillips
Walter C. Phillips, Regional Director
National Labor Relations Board
Room 701, 730 Peachtree Street, N.E.
Atlanta, Georgia 30308

Supreme Court, U. S.
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No. 76-707

In the Supreme Court of the United States

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SUMTER PLYWOOD CORPORATION, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A34) is reported at 535 F. 2d 917. The decision and order of the National Labor Relations Board (R. 200-201[1]) are reported at 215 NLRB No. 56. The Board's decision in the related representation case is set forth at Pet. App. A37-A40 and A41-A50.

JURISDICTION

The judgment of the court of appeals (Pet. App. A35) was entered on August 16, 1976, and a timely petition for rehearing was denied on October 6, 1976 (Pet. App. A36). The petition for a writ of certiorari was filed on November 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]"R." refers to the record in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

QUESTION PRESENTED

Whether the Board properly concluded that petitioner had not established that statements made by union agents during a representation election campaign warranted setting aside the election, where such statements were not inflammatory and were relevant to the economic issues in the campaign.

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, as amended, 61 Stat. 140-141, 73 Stat. 525, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. The Regional Director of the National Labor Relations Board conducted an election among the production and maintenance employees at the Livingston, Alabama, plant of petitioner (the Company) (Pet. App. A41-A42). The Union[2] won the election by a vote of 156 to 77 (*ibid.*). The Company objected to the election on the ground, *inter alia*, that the Union had introduced irrelevant racial propaganda into the campaign. The Board rejected the Company's objections and certified the Union as the bargaining agent (Pet. App. A37-A50).

[2]The Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

The Company then refused to bargain with the Union and, in the subsequent unfair labor practice proceeding, reiterated its objections to the election. The Board ordered a hearing before an administrative law judge with respect to several objections not at issue here. Thereafter the Board accepted the judge's recommendations and found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (R. 193-195). The Board entered an appropriate remedial order.

2. The Company proffered evidence that was accepted *arguendo* by the Board, which did not hold an evidentiary hearing concerning the racial issue. The Company offered to prove that the Union circulated to all employees—204 out of 241 of whom were black—an 11-page booklet of cartoons and text on the benefits of union organization. One cartoon pictured a number of obstacles in the road to organization, including a row of hurdles labelled "Uncle Tom," "Petting," and "Sweet." Another cartoon showed a black man being kicked out of a "Welfare Office" (R. 107-115). The remaining cartoons presented traditional union arguments about the benefits of organization.[3] See Pet. App. A20-A24 and n. 14.

The Company offered to prove that at two of the Union's organizing meetings a black politician who was running for local office spoke to an all-black audience; he told them that "black people should stick together" and urged them to register to vote in the coming election (Pet. App.

[3]These included some biblical excerpts; a picture of clasped hands over the message that a union contract means security; an exhortation to resist the Company's possible resort to threats; a reminder that only a union could protect employees against arbitrary layoffs; an explanation of the virtues of seniority; a cartoon showing a shabbily-dressed individual, who says, "I had a chance to *Vote Yes*"; and a final appeal to "Remember It is Your Life" (R. 109-115).

A47). At one meeting Sylvester Hicks, a union organizer, stated, in response to a black employee's complaint about the paucity of black secretaries and supervisors in the plant, that blacks had been enslaved for 100 years but that the Union could help (*id.* at A22). At another meeting Hicks said "something about black people being behind for a long time" (*ibid.*). In addition, one black employee alleged that she had been called a "white mouth" by one of the Union's representatives after she indicated that she would not support the Union (*ibid.*; R. 125).

The Company also presented evidence that "black power" bumper stickers appeared on some employees' cars shortly before the election, and that employees on occasion would exchange a clenched fist salute. The black employees in one department developed a pro-union cheer (which included this "black power" salute) a few days before the election (Pet. App. A47-A48). Finally, on two occasions pro-union black employees urged other black employees to support the Union as a matter of black pride.[4]

3. The Board concluded that these allegations, even if true, would "not warrant a finding that the election was conducted in an atmosphere of irrelevant appeals to racial prejudice calculated to inflame the employees so that they would vote for the Union on racial grounds alone" (Pet. App. A49). The Board explained (*id.* at A48-A49):

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[4]When one employee explained to a union supporter that she had not attended a union meeting because she had not thought it necessary, the union supporter responded: "that is the reason black people had not gotten any further than they had—because they would not pull together" (Pet. App. A23 n. 13). Another union supporter, in explaining the welfare office cartoon in the Union's campaign pamphlet, stated "that was the way the white had treated the black man for over 100 years" (*ibid.*; R. 121-122).

> [T]he evidence considered as a whole does not reveal the kind of appeals to racial prejudice, on matters unrelated to the election issues, which make it impossible for employees to exercise the franchise in a sober and informed manner. The [Company] presented no evidence of overt appeals to racial prejudice that would tend to engender racial hatred. An overwhelming majority of the employees in the unit were black; the [Union] directed its campaign primarily toward these employees; and because of the general election in which white and black candidates were opposing each other, race was an issue in Sumter County in November, 1972. Certainly, many of the employees were interested in their status as black individuals. It appears from the evidence that [the Union] raised the issue of race in an effort to show that it could bring economic benefits to Negro workers rather than in an effort to inflame racial hatred with irrelevant and unrelated matters. Under such circumstances the Board has found that introduction of the racial issue into a campaign does not warrant setting aside an election.[5]

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[5]The Board contrasted the facts here with the situation in *Sewell Manufacturing Co.*, 138 NLRB 66. There, the employer had charged the union with "race-mixing" and had circulated to the employees photographs of interracial dancing by persons identified as union leaders. 138 NLRB at 72. The Board found that such material was not germane to the election issues and was calculated to "exacerbate racial prejudice," and that it "so lowered [permissible election] standards that the uninhibited desires of the employees could not be determined in the election" (*ibid.*). The Board ruled that henceforth "appeals to racial prejudice on matters unrelated to the election issues or to the union's activities" would afford a basis for setting aside an election (*id.* at 71). The Board added that "the burden will be on the party making use of a racial message to establish that it was truthful and germane" (*id.* at 72). In the present case the Board found that the race-related speech was pertinent to the campaign issues and was not inflammatory.

4. The court of appeals enforced the Board's order. It found that here, as in *National Labor Relations Board* v. *Bancroft Manufacturing Co., Inc.*, 516 F. 2d 436 (C.A. 5), certiorari denied, 424 U.S. 914, which presented a similar situation, "racial considerations did not form the 'core or theme' of the Union's campaign, and that the racial messages authored by the Union were not 'inflammatory'" (Pet. App. A23). The court explained (Pet. App. A23-A25; footnotes omitted):

> The bulk of the campaign literature consisted of color-blind unionist appeals. The challenged cartoons are patently inoffensive. The term "Uncle Tom" certainly connotes some racial message, but it also connotes an economic one—the desire for a break with the tradition of economic dependency. As to the objection regarding the black male being booted from the welfare office, we can only note that the era of the invisibility of blacks in illustrative media has passed. The Company's assumption that a white figure would evince no racial message, whereas a black figure constitutes an appeal to racial hatred, is an assumption grounded in a past all too recent, but nonetheless past. Downtrodden workers are ubiquitous in Union organizing propaganda, and in choosing a color for the illustrations here, we cannot expect the Union to have been unmindful that the electorate was almost 85% black.
>
> Nothing in the record indicates that the local politician's exhortation that "black people should stick together" was anything other than an appeal for the employees votes for him in the general election. Hicks' statements to the all black audiences represented an attempt to equate black economic betterment with unionism, but could not be construed as an effort to set blacks against whites or to suggest that blacks were entitled to greater rights than whites.

> The black power salutes and bumper stickers indicate only that supporters of the Union identified betterment of the conditions of blacks with a victory of the Union in the election. They do not indicate that the Union campaign was grounded on a black versus white emotionalism. The "white mouth" comment and the few other random incidents with racial overtones suggest perhaps that some supporters of the Union attempted to capitalize on black resentment against previous oppression by associating anti-unionism with that white oppression. Even under searching scrutiny, however, these few alleged incidents in the context of the entire organizing campaign cannot be seen to rise from *de minimis* to "central" or "inflammatory" stature.

ARGUMENT

The basic question presented is whether the Board properly concluded that the racial comments in the election campaign in the present case did not preclude the employees from making a free choice to accept or reject the Union. This issue, which turns largely on an evaluation of the facts, does not warrant review by this Court. There is no conflict among the circuits on any question presented here. Moreover, the Board's conclusion is justified because the racial comments were not inflammatory and were germane to the economic issues in the campaign.

Petitioner's contention that the court of appeals applied an "impermissible double standard," which sanctions "consciousness-raising" addressed to black employees while prohibiting the identical conduct addressed to whites (Pet. 8-9), misunderstands the nature of the issues the court of appeals was called upon to resolve. The court did not draw a distinction based on race. It merely observed that, in the case of "ethnic groups which have historically been economically disadvantaged"—whether they be black or white—"the call to ethnic pride and unity

has a strong claim to congruence with the Union's traditional call to economic betterment" (Pet. App. A28). A reference to race that might in some contexts be irrelevant rabble-rousing might in other contexts convey the important message that by sticking together minority groups can lift themselves toward the level of more advantaged groups. No similar message is likely to be conveyed by "appeals to the 'ethnic pride of historically advantaged groups" (*ibid.*).[6]

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[6]There is likewise nothing to petitioner's further contention (Pet. 13-14) that the decision of the court below was based on an "irrational consideration" insofar as it took account of the Union's 79-vote margin of victory (Pet. App. A28). Since the court had already concluded that there was, at most, a minimal infusion of improper racial material in the election campaign (Pet. App. A25), it was not unreasonable to point out the improbability that the objectionable material had swayed the votes of 40 employees.

Finally, petitioner's argument (Pet. 15) that the opinion of the court of appeals is unconstitutionally vague is unpersuasive. A judicial opinion need not be drafted with the precision of a criminal statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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